THE U.S. INTERNATIONAL LABOR RELATIONS ACT

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Labor rights in the United States spring from the U.S. Constitution, federal law, and international law. The 1st Amendment of the U.S. Constitution protects the right of an individual to associate with others and the right of an association to advocate on behalf of its members. Still, as the Supreme Court has pointed out, the 1st Amendment is not a substitute for national labor relations law.[1]

The U.S. National Labor Relations Act (NLRA) was enacted by Congress in 1935 to govern relations between unions and employers in the private sector and to set the rules for the operation of the National Labor Relations Board (NLRB).[2] The NLRA declares "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or

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[1] *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464–65 (1979).

[2] Prior to the NLRA, the Congress in 1914 had legislated that "The labor of a human being is not a commodity or article of commerce," and had made clear that nothing in antitrust laws shall be construed to forbid the existence and operations of non-profit labor, agricultural or horticultural organizations instituted for self-help. 15 USCS §17. This axiom about the nature of labor was carried forward into the ILO Constitution of 1919 which announced a guiding principle that "labour should not be regarded merely as a commodity or article of commerce." Horacio Spector, *Philosophical Foundations of Labor Law,* 33 FLA. ST. U. L. REV. 1119, 1136 (2006).

protection."[3] The NLRA was revised in 1947, and there have been no significant amendments since then.[4]

The U.S. International Labor Relations Act (ILRA) is the international law accepted by the United States for the governance of domestic labor-management relations in the world economy. Unlike the NLRA, the ILRA is not specifically codified, but rather stands as an interrelated set of treaty obligations binding the United States. The ILRA began in 1934, one year earlier than the NLRA, when the United States joined the International Labour Organization (ILO) after Congress passed an enabling statute. U.S. officials had been among the architects of the ILO when its constitutional provisions were drafted in 1919, but membership by the United States did not come until the New Deal when Labor Secretary Frances Perkins promoted stronger U.S. international labor engagement.[5]

Besides ILO rules, the ILRA is also composed of the U.S. labor obligations carved into U.S. free trade agreements (FTAs).[6] Although the reference to the free flow of commerce in the NLRA may owe its origin to U.S. constitutional discourse, there has been a historical relationship between

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[3]29 USCS §160(d).

[4]Cynthia L. Estlund, *An American perspective on fundamental labour rights, in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 192, 201 (Bob Hepple ed., 2002).

[5]ILO, EDWARD PHELAN AND THE ILO 168–69 (2009); KIRSTIN DOWNEY, THE WOMAN BEHIND THE NEW DEAL 195–96 (2009).

[6]*See* Alisa DiCaprio, *Are Labor Provisions Protectionist: Evidence from the Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL'Y J. 1 (2004); Cleopatra Doumbia-Henry & Eric Gravel, *Free trade agreements and labour rights: Recent developments*, 145 INT'L LAB. REV. 185 (2006).

the regulation of international commerce and the regulation of labor conditions. Thus, the recent accretion to the ILRA from the labor chapters in the FTAs is reflective of the century-long goal of setting and harmonizing core labor law as a precondition for attaining economic growth and social justice.

The ILRA is interconnected with the NLRA. At the domestic level, the NLRB is judicially supervised by federal courts and is subject to indirect political supervision by the President and Congress. But the domestic level is not the only level on which the NLRB is accountable. As an entity of the United States, the NLRB and its actions are subject to legal oversight by organs of the ILO and by FTA tribunals. Or, in other words, the law of the NLRB includes not only the NLRA but also the ILRA.

The purpose of this article is to explicate how the ILRA provides a second level of legal accountability in the United States. The article proceeds in three parts: Part I examines the two main sources of law reflected in the ILRA—first, the ILO, and second, the U.S. FTAs. Part II assesses the effectiveness of the ILRA and presents some ideas for strengthening its effectiveness. Part III summarizes and draws conclusions, albeit briefly due to space limitations. Recognizing that our overall project honors the 75th anniversary of the NLRA, this article focuses on those aspects of labor-management relations governed by the NLRA.

I. The International Law of Labor Relations Accepted by the United States

A well-known U.S. labor law expert suggested in 2001 that "I think it is extremely unlikely that a body of international labor law governing the United States will come into existence in the foreseeable future."[7] In my view, such governing international law already exists in the form of the

[7]Matthew W. Finkin, *International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest,* 76 IND. L.J. 143 (2001).

ILRA. Part I of this article discusses the sources of the ILRA. Section A covers the ILO and Section B covers the free trade agreements with U.S. labor relations obligations.

A. The United States and the ILO

Although the "right of association for all lawful purposes" was identified as a "principle" of "special and urgent importance" in the original ILO constitution of 1919, the ILO did not enact positive law to specify that right until 1948 when the ILO finalized its new Convention concerning Freedom of Association and Protection of the Right to Organise (No. 87).[8] A year later, the ILO propounded the sister Convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively (No. 98). The two conventions are consistent with the provisions in the U.S.-ratified International Covenant on Civil and Political Rights (1966) affirming "the right to freedom of association with others," including the right to form and join trade unions for the protection of interests.[9]

C.87 and C.98 delineate rights for workers, employers, workers' organizations and employers' organizations, and the two conventions also impose obligations on public authorities and domestic law on how such organizations are treated. Moreover, C.87 calls on ratifying member states to give effect to its provisions with appropriate domestic measures. Similarly, C.98 calls for

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[8]GERRY RODGERS, EDDY LEE, LEE SWEPSTON & JASMIEN VAN DAELE, THE ILO AND THE QUEST FOR SOCIAL JUSTICE, 1919–2009 (2009) at 45–48. The 1948 ILO Conference was held in San Francisco.

[9]International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, art. 22. Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?,* in LABOUR RIGHTS AS HUMAN RIGHTS 61, 72–74 (Philip Alston, ed., 2005); Justin B. Cummins, *Invigorating Labor: A Human Rights Approach in the United States,* 19 EMORY INT'L L. REV. 1 (2005).

machinery for the purpose of ensuring respect for the right to organize. C.87 was perhaps the earliest multilateral convention to recognize rights of natural persons, enterprises, and nongovernmental organizations (NGOs).

Although the U.S. government supported the consummation of both ILO Conventions, the United States has not become a party to either C.87 or C.98. President Harry S Truman sent C.87 to the U.S. Senate in 1949, but the Senate has not yet voted on ratification.[10] C.98 was not sent to the U.S. Senate.[11] Because the United States is not a party to those conventions, the regular ILO monitoring and compliance procedures[12] are inapplicable to the United States.

Nevertheless, the United States is supervised by the ILO's Committee on Freedom of Association (CFA), a subsidiary organ of the ILO Governing Body. The tripartite CFA investigates

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[10]Steve Charnovitz, *The ILO Convention on Freedom of Association and Its Future in the United States*, 102 AM. J. INT'L L. 90 (2008).

[11]The President's failure even to send C.98 to the Senate may have stemmed from strong opposition by business The U.S. employer delegate to the ILO (Charles McCormick) worried that if this convention were sent to the Senate and ratified, the conflicting sections of the Taft-Hartley law would be nullified automatically as would many state statutes. EDWARD C. LORENZ, DEFINING GLOBAL JUSTICE. THE HISTORY OF U.S. INTERNATIONAL LABOR STANDARDS POLICY 171 (2001).

[12]That is, Articles 22–34 of the ILO Constitution and supervision by the Committee of Experts on the Application of Conventions and Recommendations. *See* Francis Maupain, *Une Rolls Royce en Mal de Revision? L'efficacite du Système de Supervision de L'OIT a L'Approche de Son Centenaire*, 114 RGDIP 465 (forthcoming 2010) and G.N. Barnes, *The Scope and Purpose of International Labour Legislation, in* LABOUR AS AN INTERNATIONAL PROBLEM 3, 18–19 (E. John Solano ed., 1920) (discussing the punitive measures available against defaulting states in the ILO).

allegations that the legislation or practice of an ILO member government violates the "principles" of freedom of association or collective bargaining. The complaint process is triggered by governments or by organizations of employers or workers, including international federations. Typically, governments do not lodge complaints. Complaints are admissible regardless of whether a respondent government has ratified C.87 and 98. When the CFA finds that there has been a violation of freedom of association standards or principles by a government, the Committee issues a report to the Governing Body and makes recommendations for how the culprit government can ensure the free exercise of trade union rights.

The CFA has investigated 43 cases against the United States.[13] The vast majority of these cases were dismissed, but in 11 cases, the CFA made recommendations to lift U.S. practice up to ILO standards. During the 21st century, there have been six cases in which the Committee found a divergence between U.S. practice and the internationally-agreed minimum.[14] The ILO website does

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[13]Based on author's tabulations from ILO LibSynd database. None of these cases were lodged by governments. For a discussion of some of these cases, see James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMPL. RTS. & EMPLOY POL'Y 65, 81–85 (1999); John C. Knapp, The Boundaries of the ILO: *A Labor Rights Argument for Institutional Cooperation*, 29 BROOKLYN J. INT'L L. 369, 389–91 (2003).

[14]The cases are: No. 2683 with regard to National Mediation Board handling of anti-union discrimination against flight attendants; No. 2547 with regard to the NLRB on the issue of university research assistants; No. 2524 with regard to the definition of "supervisor" used by the NLRB; No. 2460 with regard to North Carolina's restrictions on collective bargaining by public employees; No. 2292 with regard to rules for federal airport screeners; and No. 2227 with regard to

not publicize any information as to the outcome of those six cases. As far as I know, the United States has not yet taken action that would satisfy the CFA on any of those six cases.

A CFA finding against a government is generally described as not having legal consequences.[15] Certainly, there is no CFA jurisprudence holding that a government cited by the CFA has an international law obligation to bring its offending measure into compliance with ILO principles. But the CFA's reticence could change with future jurisprudence. In my view, if a state has an obligation under the ILO Constitution, then a specific finding by the competent ILO tribunal that such obligation is being flouted should harden, not soften, the bindingness of the underlying obligation.

Under U.S. law and practice, a CFA recommendation against the United States does not have any apparent legal consequences. A computer search did not elicit any federal or state court cases where the court cited a CFA holding. Rather surprisingly, CFA jurisprudence is not routinely cited by the NLRB. In fact, a computer search yielded only one NLRB case where a CFA case was even mentioned. That was in a footnote in a dissenting opinion by Wilma Liebman in 2005.[16] The absence of such citations might be explained by an article several years ago by former NLRB

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the U.S. Supreme Court case *Hoffman Plastic Compounds v. NLRB.*

[15]Bob Hepple, LABOUR LAWS AND GLOBAL TRADE 56 (2005); Brian A. Langille, *Core Labour Rights – The True Story (Reply to Alston),* 16 EUR. J. INT'L L. 409, 413 (2005) (referring to this and other ILO supervisory procedures as "a game of moral persuasion and, at most, public shaming. It is decidedly a soft law system.").

[16]344 NLRB No. 124.

Chairman William B. Gould IV who revealed that in the 1990s, "had the NLRB dared cite a decision or opinion by the ILO, it would have risked denial of appropriations and perhaps worse."[17]

The fundamental status within the ILO of union recognition and collective bargaining rights was reinforced in 1998 when the ILO adopted its Declaration on Fundamental Principles and Rights at Work.[18] The Declaration states that all ILO members, even if a member has not ratified the relevant conventions, "have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution [of the ILO], the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining" ….[19] Under the Declaration's follow-up procedures, every government that

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[17]William B. Gould IV, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 HOFSTRA LAB. & EMP. L.J. 1, 10 (2005). More recently, he predicted that "If an NLRB Chairman were to cite decisions of the International Labor Organization . . . he or she would be concerned with impeachment for such brazen audacity." William B. Gould IV, *Labor Law and Its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 684 (2003).

[18]The Declaration is controversial. *See* Philip Alston, *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467, 479 (2005) (the ILO should insist that the normative content of the Declaration's principles mirrors that of the relevant conventions); Guy Standing, *The ILO: An Agency for Globalization?*, 39 DEVELOPMENT & CHANGE 355, 367 (2008) (the Declaration further weakened the ILO by making even the core "standards" subject only to monitoring by means that were "strictly promotional"...).

[19]ILO Declaration, para. 2, June 18, 1998, *available at* http://www.ilo.org/declaration/lang--en/index.htm. The other fundamental rights subject to the Declaration concern forced labor, child

has not ratified one of the fundamental ILO conventions commits to report periodically on the status of the relevant rights in its territories.[20]

The 2010 Country Baseline posted on the ILO website quotes from a report by the U.S. government on the status of freedom of association and collective bargaining. The U.S. report admits that there are "several challenges to the full exercise of the rights of freedom of association and collective bargaining" in the United States, and asserts that many of these challenges were first identified in 1999 when the United States submitted its first report under the Declaration.[21] In addition, the U.S. government states that "Federal legislation and practice appear to be in general conformance with ILO Conventions 87 and 98, though the challenges identified above persist…."[22] On the other hand, the U.S. report states that "it must be acknowledged that some aspects of the U.S. labor law system could be improved to more fully protect the rights to organize and bargain collectively of all employees in all circumstances."[23] The U.S. report indicates that President Obama has expressed support for the Employee Free Choice Act which, the report claims, would address

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labor, and employment discrimination.

[20]Francis Maupain, *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization,* 20 EUR. J. INT'L L. 823 (2009).

[21]Country Baseline under the ILO Declaration Annual Review 2000–2010: United States, at 212, *available at* http://www.ilo.org/declaration/follow-up/annualreview/countrybaselines/lang--en/docName--WCMS_091262/index.htm.

[22]*Id*. at 215.

[23]*Id*. at 214.

many of the concerns noted above.[24] The report does not explain how this proposed Act would respond to the ILO's criticisms about U.S. practices.

The U.S. Baseline also includes comments by the ILO Declaration Expert-Advisers. They state that "restrictions on the rights of certain categories of workers in United States, such as workers in the public service and agricultural workers, to organize, were not compatible with realization of this principle and right." The Expert-Advisers also note that they are concerned that the absence of U.S. ratification of C.87 and C.98 "leaves many millions of workers and employers without the protection offered by these instruments in international law…."

In summary, although the United States has declined to ratify the fundamental ILO conventions on labor relations, the United States is nevertheless obliged, by virtue of its ILO membership, to comply with the principles of freedom of association and collective bargaining as broadly articulated in C.87 and 98. Over 50 cases have been brought against the United States in the CFA and, in recent years, there has been a substantial record developed of a failure by the United States in specific instances to respect the international principles. In its most recent report under the ILO Declaration, the Obama Administration admits "challenges" in particular areas and indeed cites some of the recent CFA holdings against the United States. The Administration's report to the ILO does not present any timetable for complying with the U.S. losses in the CFA; nor does the Administration commit to seeking U.S. Senate approval of C.87 and 98. Under current ILO practice, there has been an exhaustion of what the ILO can do to secure greater compliance by the U.S. government with respect to collective bargaining and freedom of association.

B. The Labor Law Commitments in U.S. FTAs

[24] *Id*. at 212.

The U.S.-Peru Trade Promotion Agreement of 2006 is the most recent of the implemented U.S. FTAs.[25] Moreover, this agreement is the most-advanced FTA in force with respect to fundamental labor rights. The FTA enhances the legalization of the ILO Declaration by explicitly committing both parties to adhere to it and by backing that up with trade sanctions or monetary fines. Compared to the ILO Declaration, the FTA evinces greater authority and control intention. The FTA requires each party to "adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining;…"[26] In addition, the FTA declares that neither party "shall waive or otherwise derogate from, its statutes or regulations" relating to the above, "in a manner affecting trade or investment between the Parties…."[27]

Because the U.S. government has contracted with Peru to adopt and maintain the rights of freedom of association and collective bargaining and to provide effective recognition of the right to

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[25]United States–Peru Trade Promotion Agreement, Apr. 12, 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text. Michael A. Cabin, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, 109 COLUM. L. REV. 1047 (2009).

[26]U.S.–Peru FTA, *supra* note 25, Art. 17.2(1) (footnote omitted). The footnote explains that the obligations, as they relate to the ILO, refer only to the ILO Declaration. The Bush Administration negotiated three additional FTAs with South Korea, Panama, and Colombia that have similar labor commitments, but the Obama Administration has not sought Congressional approval of any of those labor-friendly FTAs.

[27]U.S.–Peru FTA, *supra* note 25, Art. 17.2(2).

collective bargaining, these provisions form part of the ILRA. Unlike the ILO where legal commitments are made multilaterally and to the ILO itself, these FTA legal commitments are made only to one country, Peru.

The U.S.–Peru FTA also contains several other labor obligations. First, the FTA forbids each government from failing to effectively enforce domestic labor laws through a sustained or recurring course of action or inaction (in a manner affecting trade or investment between the parties). Second, the FTA requires that persons with a legally recognized interest have appropriate access to domestic tribunals for the enforcement of labor laws.[28] Proceedings under such administrative or judicial tribunals must not entail unreasonable charges or unwarranted delays; moreover, final decisions shall be made available without undue delay to the parties.

The labor rules in the FTA are subject to a state-to-state dispute settlement system. The multiple steps required to get a tribunal are: (1) cooperative labor consultations between the governments, (2) a convening of the Labor Affairs Council consisting of cabinet-level representatives which may consult outside experts, (3) a request for intergovernmental consultations, and finally (4) a request for an arbitral panel of three members who follow the FTA Model Rules of Procedure. The final report from the panel is due within 150 days. If the panel determines that the defendant party has not conformed to its FTA obligations, the preferred resolution is for that party to eliminate the non-conformity. If after 45 days the parties cannot agree upon a resolution, the parties are to enter into consultations for compensation and if that is not agreed upon, then the complaining party may suspend trade benefits of equivalent effect. Such

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[28]U.S.–Peru FTA, supra note 25, Art. 17.4(1). For the United States, labor laws refers only to the U.S. Constitution and federal statutes or regulations promulgated pursuant to acts of Congress. *Id.* Art. 17.8.

trade sanctions may begin after 30 days unless the defendant party agrees to pay an annual monetary assessment. So far, these dispute procedures have not been used.

As of August 2010, the United States has made labor commitments in eight other FTAs currently in force as well as in a side agreement to the North American Free Trade Agreement (Canada and Mexico).[29] The labor commitments in these FTAs are less normative than in the U.S.-Peru FTA and do not contain its core obligation to adopt and maintain in statutes and regulations the rights of association and collective bargaining. For example in the Dominican Republic, Central America and U.S. FTA, the parties agreed that they "shall strive to ensure" that labor principles and internationally recognized labor rights are recognized and protected by domestic law. Whether the "strive to ensure" rule is tight enough for arbitral enforceable has yet to be tested as there have been no disputes brought under this FTA. Indeed, no U.S. trading partner has ever lodged an FTA dispute against the United States and, perhaps in reciprocity, the United States has not yet lodged an FTA labor dispute against another country.[30]

II. Assessing and Strengthening the ILRA

To assess the ILRA, one needs to start with an understanding of its purpose. International labor law serves two main purposes: First, ILO standards can provide the rules of the road for the

[29]The eight FTAs are with Australia, Bahrain, Central America (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic, Chile, Jordan, Morocco, Oman, and Singapore.

[30]*But see* Len Bracken, *U.S. Will File First-Ever FTA Labor Case Against Guatemala, USTR Chief Kirk Says,* BNA Daily Report for Executives, Aug. 2, 2010, at A-17.

world economy and labor markets.[31] Second, the international labor regime can enhance the accountability of domestic labor agencies and prevent regulatory failure.

As to the purpose of incorporating labor obligations into U.S. FTAs, two explanations seem most cogent. First, the U.S. government is locking in its labor law via a legal commitment to other countries. Second, the U.S. government is using the U.S. commitment instrumentally to seek matching policies in other countries. In that regard, the U.S. government could be motivated by altruistic reasons (e.g., to promote social justice and democracy in other countries), by pragmatic reasons because "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries,"[32] or by commercial reasons to prevent unfair competition. Alleged unfair competition has been a longtime preoccupation of U.S. labor policymakers. In 1919, for example, the War Labor Policies Board stated that "As a natural consequence of unequal international standards, nations with higher labor standards are handicapped in competition with nations having lower standards."[33]

Although this article looks only at the U.S. ILRA, a more comprehensive examination would also look at FTAs in other countries. For example, the Canada–Peru FTA of 2008 cross-references a bilateral Labour Cooperation Agreement that contains substantive labor obligations

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[31]For further discussion of the rationale for international labor standards, see Steve Charnovitz, *The International Labour Organization in its Second Century*, *in* 4 MAX PLANCK Y.B. UNITED NATIONS L. 147, 165–68 (2000).

[32]ILO Constitution, Preamble (1919). C.J. Ratzlaff, *The International Labor Organization*, 22 AM. ECON. REV. 447, 450 (1932) (noting that because of economic internationalization, the regulation of industry and labor can be brought about by the ILO easier than one nation at a time).

[33]WAR LABOR POLICIES BOARD, REPORT ON INTERNATIONAL LABOR STANDARDS 7 (1919).

paralleling those in the U.S.–Peru FTA.[34] On the other hand, many FTAs have no provisions regarding labor other than on the temporary entry of professionals.

The efficiency of using both labor and trade treaties to institutionalize labor standards has been questioned. Some would argue that treatymakers should avoid duplication. Nevertheless, there are benefits in employing both types of treaty at the same time.[35] First, by using two treaties, governments and civil society get the benefits of two different compliance systems. Second, bilateral trade agreements offer two parties the opportunity to add on to the multilateral law operating between them.

An assessment of the effectiveness of the ILO Declaration is complex, and cannot be fully addressed here.[36] The Declaration has been successful in several ways. It has secured periodic reports from ILO governments on the domestic status of freedom of association and collective bargaining.[37] It has succeeded in boosting ratifications of C.87 and C.98.[38] The Declaration has also succeeded in gaining sufficient legitimacy that it can be readily transplanted into FTAs.

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[34]Canada-Peru Free Trade Agreement, Art. 1603, *available at* http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp; Agreement on Labour Cooperation between Canada and the Republic of Peru, *available at* http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/Labour_CPFTA_e.asp.

[35]Alan Hyde, *A game theory account and defence of transnational labour standards – a preliminary look at the problem, in* GLOBALIZATION AND THE FUTURE OF LABOUR LAW 143, 153–54 (John D. Craig & S. Michael Lynk eds., 2006).

[36]See ILO Report of the Director-General, Freedom of association in practice: Lessons Learned, ILC, 97th Session, 2008, Report I (B).

[37]Of course, even before the Declaration, a non-party to an ILO convention was required to report

Today may be too early to evaluate the effectiveness of the FTA labor chapters. Since there have been no disputes, one does not know how panels will interpret FTA obligations and whether the threatened trade sanctions and monetary assessments will promote compliance with panel directives. This author is not aware of any detailed study of FTA institutional labor cooperation, but my impression is that there has been little, if any, capacity building for the United States on labor-management relations.

The U.S. government should take several steps to upgrade its engagement with the ILO. First, as I recommended in 1995, the United States should appoint an ambassador (or permanent representative) to the ILO to better represent U.S. interests. Second, the President's Committee on the ILO (PCILO), which had not met for 10 years when it was convened in May 2010, should convene regularly and should set up a website to achieve greater transparency.[39] Third, the PCILO should develop a strategy for achieving Senate approval of C.87 which is the longest-pending treaty before the Senate. Fourth, the PCILO should take up all cases in which the CFA rules (or has ruled) against the United States and make recommendations to the President on whether the United States should come into compliance and, if so. how. Fifth, the appropriate Congressional committees should convene a hearing every time the CFA rules against the United States.

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on its law and practice and the difficulties that prevent ratification. ILO Constitution, Art. 19.5(e).

[38]Ratifications of C.87 have risen from 121 to 150; ratifications of C.98 have risen from 137 to 160. ILO, Review of the follow-up to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, Report VII, ILC, 99th Session, 2010, para. 24.

[39]The PCILO is the primary institution fulfilling U.S. responsibilities under the ILO Tripartite Consultation Convention No. 144, which entered into force for the United States in 1988.

The United States also needs to strengthen the rule of law domestically. The Congress should consider importing from trade law the Section 129 procedure into the NLRA. Under Section 129 of the Uruguay Round Agreements Act, the U.S. Trade Representative (USTR) can request the U.S. International Trade Commission to take action following a WTO decision that a ruling by the Commission was not in accord with the WTO obligations of the United States.[40] Specifically, USTR may request the Commission to consider whether its statutory authority would permit it to render its ruling not inconsistent with WTO findings. If the Commission advises that it has such authority, USTR may request the Commission to change its ruling within 120 days.

An analogous procedure could be established for the NLRB in conjunction with an adverse decision by the CFA on an NLRB case. Specifically, the Section 129 for labor relations could give the Secretary of State the triggering role to ask the NLRB to consider whether it has authority to render its ruling not inconsistent with the findings of the CFA. Should the NLRA find that it has that authority, then, after weighing the pros and cons, the Secretary of State could ask the NLRA to reverse its prior ruling.

Note that the Section 129 trade process does not help the United States when a change in federal law is needed to bring the United States into compliance with WTO rules. The same disability would exist with a labor Section 129; that is, if compliance with the CFA decision requires an amendment to the NLRA or to another U.S. labor law, it would be up to the Congress to take that action. Of course, in considering whether to correct U.S. law, the Congress should recall *Federalist* No. 63, wherein Madison counseled: "An attention to the judgment of other nations is important to every government for two reasons" the second being that … "in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary

[40] 19 USCS §3538(a).

interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."

The NLRB and the U.S. National Mediation Board also need to expand their own legal space in respect of international labor law. In perusing the NLRB website, one gets the sense that ILO decisions are not part of the toolbox of NLRB practice. The NLRB website appears to say nothing about the international labor law binding the United States and does not advise worker or employer organizations of their right to complain to the CFA about a Board decision that transgresses the principles of the ILO. As far as I know, there is no ongoing program of dialogue between members of the NLRB (and administrative law judges) and members of the ILO's quasi-judicial bodies. All of these omissions can be rectified without new legislation, and should be.

While I would not go monist in contending that the entire jurisprudence of the CFA should be a rule of decision in U.S. federal and state courts, I would argue that this jurisprudence should be considered by U.S. courts as a persuasive exposition of the international labor law obligations of the United States. Adjudications in the ILO are obviously not foreign law; they are reflective of international law which is part of U.S. law. Too often, American courts are embarrassingly parochial when it comes to enforcing international law.[41] By contrast, national courts in other countries, such as Argentina and Canada, have struck down laws based, at least in part, on the holdings of ILO supervisory bodies.[42]

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[41]For an example, see Steve Charnovitz, *Revitalizing the U.S. Compliance Power,* 102 AM. J. INT'L L. 551 (2008) (discussing the *Medellin* decision of the U.S. Supreme Court).

[42]Arturo Bronstein, *Labour Law in Latin America: Some Recent (and not so Recent) Trends,* 26 INT'L J. COMP. LAB. L. & INDUS. REL., Mar. 2010, at 17, 21; Eric Gravel & Quentin Delpech, *International labour standards: Recent developments in complementarity between the international*

Let me now turn to how the labor chapters of the FTAs can be improved. Looking back at the experience since 1994 when the first U.S. FTA labor commitments went into force, the evidence is now in we cannot depend upon other governments to bring needed labor cases against the United States. No such cases have been brought, and none are likely to be. Two reasons explain this: first, governments are loathe to bring labor cases against each other; and second, the asymmetry of power between the United States and each of its FTA partners means that a country lodging a complaint against the United States risks U.S. retaliation. In addition, no international legal aid program exists to help small countries litigate labor cases against the United States.

The flaw in the FTA labor chapters is that there is no private right of action to bring cases as there is in the FTA investment chapters where an investor can bring a case against a foreign government. The ILO CFA complaint process has been effective because injured private actors are enabled to lodge cases. This same technique of individual empowerment should be utilized in the FTA labor chapter (even if cases can only be brought against a foreign government).

III. Conclusions

All countries have an International and National labor relations act and the legal content of this legislative dyad differs from country to country. The ILO principles on freedom of association define a minimum level for every country, and that is supplemented in many countries by additional labor commitment in other treaties. In each country, there is a distinctive interplay between international acts and national praxis.

In the United States, the interplay between the "I" and "N" tilts away from the "I." The domestic labor tribunals are unchaperoned by international tribunals and there is remarkably little real world synergy between the ILRA and the NLRA. In addition, the Congress fails to regularly

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and national supervisory systems, 147 INT'L LAB. REV. 403, 410–14 (2008).

take advantage of learning in other countries and in the ILO that could help achieve the exercise by workers of full freedom of association.

Looking to the future, a stronger ILRA is a path for strengthening the NLRA.